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81-520

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 14, 1981

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QUESTION PRESENTED

Is the Federal Communications Commission obliged, in regulating cable television, to reflect the national policy expressed in Public Law 87-331 that professional sports leagues are entitled to control the pattern of television broadcasts of their games in order to promote equal access to television exposure by member teams and to protect gate receipts and game attendance from undue damage from telecasts of NFL games, notwithstanding that Public Law 87-331 is not part of the Communications Act?*

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* The following parties were either petitioners or intervenors aligned with petitioners in the court below: The National Association of Broadcasters; Hubbard Broadcasting, Inc.; Midwest Television, Inc.; Post-Newsweek Stations, Inc.; John Blair & Company; Malrite T.V. of New York, Inc.; McGraw-Hill Broadcasting Company, Inc.; American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.; Association of Independent Television Stations, Inc.; Field Communications Corporation; Metromedia, Inc.; Commissioner of Baseball; National Basketball Association; National Hockey League; National Football League; Taft Broadcasting Company; Storer Broadcasting Company; Springfield Television Corporation; Delta Television Corp.; Evans Broadcasting Corp.; Gaylord Broadcasting Company; Jet Broadcasting Company, Inc.; Motion Picture Association of America; Omega Communications, Inc.; Cedar Rapids Television Co.; Gilmore Broadcasting Corp.; Jefferson-Pilot Broadcasting Co.; Jefferson-Pilot Broadcasting Co. of Virginia; KHQ, Inc.; KTVE, Inc.; WALB-TV, Inc.; WJHG, Inc.; Bahia de San Francisco Television Co.; Forward Communications Corporation; Futura Communications Corporation; Guaranty Broadcasting Corporation; John H. Phipps Broadcasting Stations, Inc.; K-Six Television, Inc.; May Broadcasting Co.; Park Broadcasting Inc.; Plains Television Corp.; Ralph C. Wilson Industries, Inc.; Retlaw Enterprises, Inc.; Service Broadcasters, Inc.; Seven Hills Television Co., Inc.; Southern Television Corp.; Spanish International Communications Corp.; Studio Broadcasting System Division of Highwood Service, Inc.; Summit Radio Corporation; Telecorpus, Inc.; WICS-TV, Inc.; Wilson Communications, Inc.; Winnebago Television Corp.; WIXT Television,

Inc.; WKRG-TV, Inc.; Ziff-Davis Broadcasting Company; and Tribune Company.

Respondents in the court below were the Federal Communications Commission and the United States of America. Aligned with respondents in the court below were intervenors National Cable Television Association, Inc.; Community Antenna Television Association, Inc.; Allen's TV Cable Service, Inc.; United Video, Inc.; American Video Corp.; Asbury and James TV Cable Service; Audubon Electronics, Inc.; Better Cable TV; Brownwood TV Cable Service, Inc.; Cablevision of Pennsylvania, Inc.; Cass Community Antenna TV; CATV General Corporation; Central Communications Corp.; Chattanooga Cable TV Co.; Clearview Cable Corp. of South Carolina; Community Cablevision Corp.; Coosa Cable Company; Corsicana Cable TV Co.; Daniels Properties, Inc.; Dorate, Inc.; Greater Media, Inc.; Harmon and Company; Hawaiian Cable Vision Corp.; Hill City Cable TV Company; Hurley Cable TV, Inc.; Intertie, Inc.; Lakeview TV, Inc.; Landmark Cablevision Associates; Lynn County CATV, Inc.; Maine Cable Television, Inc.; McDonald Group, Inc.; Pearson Cable TV Antenna System, Inc.; Piggott Video Cable, Inc.; Pinebelt Cablevision, Inc.; Rockford Cablevision, Inc.; Schuylkill Valley Trans-Video Corp.; Shen-Heights TV Associates, Inc.; Snyder Community Antenna Television, Inc.; Sweetwater Television Co.; Telecommunications, Inc.; Television Enterprises, Inc.; Tele-View, Inc.; TOCOM, Inc.; Total Television, Ltd.; Transcable, Inc.; Twin County Trans-Video, Inc.; UA-Columbia Cablevision, Inc.; United Cable Television Corporation; Valley Antenna Systems, Inc.; Vandalia Cable TV Co., Inc.; and Wood River Cable-Vision, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Football League prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case, styled below as *Malrite T.V. of New York, Inc., et al.* v. *Federal Communications Commission, et al.*, on June 16, 1981, denying petitions to set aside a Report and Order of the Federal Communications Commission in Docket Nos. 20988 and 21284 which repealed certain cable television regulations.

OPINIONS BELOW

The opinion of the court of appeals is reported at —— F.2d —— and is reproduced as Appendix C to the petition of the National Association of Broadcasters (hereinafter "NAB Pet."). The Report and Order of

the Federal Communications Commission is reported at 79 F.C.C.2d 663 and is reproduced in NAB Pet. Supplemental App.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1981. *See* NAB Pet. App. C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Public Law 87-331, as amended, 15 U.S.C. §§ 1291-95 (1976), is set forth in the Appendix to this Petition. Sections 76.57-.63 of the cable television regulations of the Federal Communications Commission in effect before entry of the judgment of the court of appeals, 47 C.F.R. §§ 76.57-.63, are set forth in NAB Pet. App. B.

STATEMENT OF THE CASE

Cable Television

So far as relevant here, cable television (or CATV) systems take television broadcast signals, amplify them, and distribute them through cables to subscribing homes. These systems perform two services: improving reception of "local" television stations in homes that might not otherwise receive clear signals through conventional antennas, and importing "distant" television signals which could not otherwise be received in the area in which the system is located. (Cable systems also originate various kinds of programming, but this activity is not involved in this case.)

The Federal Communications Commission's regulation of cable importation of distant signals has primarily involved striking a balance between increasing viewer options and not unduly undermining the viability of local television broadcast service. In its distant signal rules, adopted in 1972, the Commission attempted to strike this

balance by restricting the number and type of distant signals cable systems were allowed to carry along with local signals, which were required to be carried. In general, systems could carry distant signals which, when added to local signals, would provide subscribers with the programming of the three commercial television networks, and, depending on the size of the market, one to three independent (non-network) stations. In addition, one or two extra independent stations could be imported in certain situations. 47 C.F.R. §§ 76.57-.63; NAB Pet. App. B.

Last year, however, the Commission decided, after lengthy rulemaking proceedings, to eliminate these distant signal rules altogether. Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C.2d 663 (1980); NAB Pet. Supp. App. This decision was stayed by the Second Circuit to hear an appeal by various broadcasters, professional sports leagues, including the National Football League (NFL), and other program suppliers. Upon the Second Circuit's decision (NAB Pet. App. C) to affirm the FCC's Report and Order—the decision of which we seek review here—the stay expired, and the distant signal rules outlined above are no longer in effect.

This means that cable systems will be authorized to import as many distant signals, of whatever kind, as the systems wish and are financially and technically able to carry.

Cable television is big business. An estimated 19 million homes now subscribe to cable, and that figure is expected to double by 1985. Industry revenues exceeded $1.5 billion in 1978. Major multiple-system operators include Time, Inc., American Express, Westinghouse, The Times-Mirror Company, Warner Communications, The New York Times and Dow Jones.

The availability of otherwise unviewable sports telecasts has always been a prime attraction of cable systems, particularly now, with satellite transmission of stations that feature heavy sports programming.[1] Thus far, this has not generally included NFL games. The reason is that, except for a few pre-season exhibition games, all NFL games are telecast over one of the three commercial television networks, and the Commission's distant signal rules forbade importation of distant network stations in all but the smallest television markets.

NFL Television Patterns

NFL television contracts have always been based on two principles. One is to give each team approximately equal television exposure (and equal revenue) and, in particular, to require the networks to televise each team's away games back to its home territory, notwithstanding that the networks might prefer to televise only a few, more attractive games. The second is to maintain primary emphasis on attracting fans to the stadium, and keep the sport from becoming "studio" entertainment, by limiting the extent to which games are available on television within a team's home territory when the team is playing at home.

In 1961, Congress specifically endorsed these principles when it enacted Public Law 87-331, as amended, 15 U.S.C. §§ 1291-95 (1976). The 1961 statute exempted from the antitrust laws a type of contract by which member clubs of a professional sports league pooled their television rights and sold them to a single television network. The specific contract between the NFL and CBS that was before the Congress had two key features: It prohibited the network from telecasting

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[1] Among the most popular distant stations on cable are WTBS, Atlanta, WPIX and WOR, New York, and WGN, Chicago. During 1981, these four stations were scheduled to televise 569 major league baseball games.

any games into the home territory of any NFL team—roughly, an area extending 75 miles around the home city—on a day when the team was playing a home game; and it required the network to telecast each team's away games back to the team's home territory. And, of course, because the network had no more than one affiliated station in a television market, no more than one NFL game could be telecast in any market. The Judiciary Committees of the Senate and the House both recognized that the two television principles described above were in the public interest and important to the success of the NFL. They accepted the concept that a pooled contract would enable the NFL to implement these television principles, H.R. Rep. No. 1178, 87th Cong., 1st Sess. at 2-3 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. at 2-3 (1961), and the statute expressly preserved the right of member clubs to control telecasts within the home territory when a team was playing at home, 15 U.S.C. § 1292.[2]

Thus, the concept of having a balanced league, giving each team roughly equal television exposure and equal television revenue, and allowing teams to limit the potential for television injury to ticket sales and game attendance, was found by Congress to be in the public interest and worthy of express exemption from the antitrust laws.

Although two networks now carry the games of the expanded NFL on Sundays (and the third network carries games on Monday evenings and at other special times), NFL television patterns continue to reflect this

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[2] A district court had ruled that a pooled contract, because it would give the network too much control over which game would be telecast in which city, would violate a decree entered by the court in an earlier antitrust suit. United States v. National Football League, 196 F.Supp. 945 (E.D. Pa. 1961). In the earlier case, the court had ruled, on the other hand, that joint restrictions on telecasts within a team's home territory when the team was playing at home were reasonable and not a violation of the Sherman Act. *Id.*, 116 F.Supp. 319 (E.D. Pa. 1953).

concept. Each game is televised back to the home territory of the visiting team, and two other games are generally also telecast in the same areas. In the home territory, when a home game is played, two games are usually telecast, but this does not include the home game itself (unless it was sold out 72 hours before kickoff).[3]

The Potential Impact of Cable Television

Cable television, if not suitably regulated, threatens substantial injury to this concept. There is no technological limit to the ability of cable television systems to "import" into any city multiple television signals from anywhere in the country. If not restricted by regulation, a cable system could therefore bring into an NFL team's home territory, when the team is playing a home game on a Sunday, every NFL game being played that day. (Cable systems' advertising has always trumpeted the availability of additional sports telecasts.) The team would then face the prospect of attempting to sell tickets to fans who could watch up to a dozen NFL games on television instead of the two games now allowed by the NFL television contracts. Moreover, the networks are likely to resist bringing every team's away games back

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[3] Originally, NFL clubs allowed no NFL game telecasts in their home territory when they were playing home games, but this was relaxed in 1965 on an experimental basis and now is a permanent fixture. Even so, the clubs limit to two the number of games telecast in the home city in such cases, and potential injury to ticket sales and game attendance is further limited by specifying that one of the telecast games be one that starts earlier or later than the home game.

NFL clubs never allowed the home game itself to be televised into the home territory, but in 1973 Congress forced a change in this practice as to sold-out games. *See* Public Law 93-107, formerly codified as 47 U.S.C. § 331. Although this law expired at the end of 1975, the NFL has voluntarily continued to observe the law's requirements and study its effects.

to its home territory (at considerable cost to the network) when such games have to compete for audience with up to eleven other televised games instead of only two.

The NFL and other professional sports interests have repeatedly brought these concerns to the attention of the FCC. They have urged that the Commission is obliged to give full recognition to what Congress did in 1961: allowing professional league sports virtually complete control over their television patterns in order to keep the fans coming to the stadium and to prevent a minority of teams from monopolizing television coverage in the nation.[4] In the proceeding at issue here, professional sports interests asked that the FCC not abandon its distant signal rules or that it adopt a rule requiring cable systems to obtain the consent of the program producer before retransmitting certain types of programs. The Commission, however, ignored the unique situation of professional team sports and decided that "sports programming should stand on the same footing as all other programming." (Report and Order ¶ 322, 79 F.C.C.2d at 811). The Commission thus declined to recognize the special status which Congress conferred upon profes-

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[4] Thus far, the only FCC acknowledgment of Public Law 87-331 was in a 1975 rule which prevents cable systems from importing into a 35-mile area around an NFL city (not the 75-mile home territory used by the NFL for decades and accepted by Congress) a telecast of the home game itself. 47 C.F.R. § 76.67; *see* Report and Order in Docket 19417, 54 F.C.C.2d 265 (1975). In view of the recently expressed attitude of the FCC toward "deregulation" in general and toward allowing unlimited growth of cable, it is very uncertain whether even this limited restriction will remain on the books for long. Indeed, the Commission's attitude toward sports as being just another form of television programming strongly indicates that this "home game" rule is targeted for prompt elimination.

sional sports telecasting by the enactment of Public Law 87-331. The Second Circuit affirmed without ever mentioning the statute.

REASONS FOR GRANTING THE WRIT

The precise issue presented by this petition is a simple one: whether the Federal Communications Commission is obliged to reflect in its decisions the totality of congressional declaration of national television policy, or whether, on the other hand, the Commission is free to ignore congressionally declared television policy which is not contained in the Communications Act and which bears on the nature of professional team sports rather than on the welfare of the television industry. The issue can be stated in broader terms: To what extent must an administrative agency pay heed to congressional declarations of policy which relate to the subject matter the agency is constituted to administer but which are not contained in the agency's organic statute?

With one possible exception, we are aware of no case in which this Court has addressed this important question. Nor has the Court ever construed Public Law 87-331, the statute on which we rely.[5]

It is true that the Court has dealt with a related question, namely, whether an agency's organic statute permits or requires the agency to take account of a sweeping national policy, such as preventing employment discrimination, promoting competition, or protecting the environment. Thus, in *NAACP* v. *FPC*, 425 U.S. 662 (1976), the Court held that the Federal Power Commission may concern itself with discriminatory employment practices by the companies it regulates. This decision, however, was

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[5] The statute is mentioned but not discussed in Flood v. Kuhn, 407 U.S. 258, 281-82 (1972).

based upon the Commission's power to establish "just and reasonable" rates for electrical energy and natural gas and upon the view that unnecessary or illegal costs which result from discriminatory practices arguably should not be passed on to consumers. The Court rejected a broader contention based upon the statutory declarations that the electric and gas business are "affected with the public interest," holding (as it had previously) that these words in a regulatory statute do not give an agency "broad license to promote the general public welfare." 425 U.S. at 669. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), the Court held that the ICC was required to consider the competitive effect of a merger of truckers but to do so in the light of the objectives of the agency's organic statute. In *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, on the other hand, the Court held that the Secretary of HUD need not prepare an environmental impact statement with respect to a planned subdivision that was the subject of a disclosure statement the developer was required to file under the Interstate Land Sales Full Disclosure Act, but again the decision turned on construction of the Act, which makes a disclosure statement effective on the thirtieth day after filing, too little time to prepare an impact statement.

In this case, however, we do not rely on the Communications Act to support giving professional sports leagues control over their telecast patterns.[6] Nor do we contend that the FCC has a "broad license to promote the general public welfare." Instead, the statutory basis for our position is Public Law 87-331, which, although

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[6] Except, of course, insofar as the Act gives the Commission authority to regulate cable television. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

codified among the antitrust laws, deals directly with television. It says that the producers of certain types of entertainment are different from all other entertainment producers, enough so to warrant that rarest of congressional actions, an exemption from the Federal antitrust laws. Congress weighed the interests of professional sports teams in controlling their telecast patterns and found these interests worthy of approval, rather than leaving the determination of which games would be seen in which cities to be left to the ordinary process of the marketplace. Congress endorsed as a public good the NFL's policy of allowing last year's last place team to have television exposure and television revenue equal to last year's champion, and of not allowing the proliferation of game telecasts to injure ticket sales and attendance at the stadium.

The one case that is arguably in point here is *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942). The Labor Board has discretion to fashion appropriate remedies when it finds that an employer has committed an unfair labor practice, and ordering reinstatement of employees who strike and are replaced is a typical remedy. In this case, however, the employees were seamen, and a strike by seamen is mutiny, a serious crime. The Court held that the Board abused its discretion when it ordered reinstatement of the mutineers:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." 316 U.S. at 47.

The error the FCC committed in the course of repealing the distant signal rules was to ignore totally the policy expressed in Public Law 87-331. The Commission focused almost entirely on whether elimination of the rules would cause undue competitive injury to television stations, a matter on which the professional sports leagues took no position. Nowhere did the Commission refer to the NFL's plea that it be allowed to continue the control over its telecast patterns which it enjoyed under Public Law 87-331 before the growth of cable television. The sole reference to sports programming, contained in six paragraphs (out of 333) in its *Report and Order*, comes down to the Commission's assertion that it did not believe "the general amount of televised sports events has been or will be seriously diminished." (Report and Order ¶ 320, 79 F.C.C.2d at 809-10). This assertion simply does not respond to the principal contention made by the NFL. Nor did the Second Circuit, in its decision upholding the Commission, address the impact of Public Law 87-331.

Televising of professional sports is an important feature of American life. The NFL has developed policies designed to balance the interest in wider viewing of NFL games against the interest in having balanced teams playing before live fans. Congress has endorsed those policies, but the FCC, the agency with power to effectuate those policies in its cable television rules, has ignored what Congress said. This Court should review the decision below in order to address the question of the Commission's responsibility to heed a statute which expresses an important national television policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 14, 1981

APPENDIX

APPENDIX

Public Law 87-331, 15 U.S.C. §§ 1291-95

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CHAPTER 32—TELECASTING OF PROFESSIONAL SPORTS CONTESTS

Sec.

1291. Exemption from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues.

1292. Area telecasting restriction limitation.

1293. Intercollegiate and interscholastic football contest limitations.

1294. Antitrust laws unaffected as regards to other activities of professional sports contests.

1295. "Persons" defined.

§ 1291. Exemption from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 U.S.C. 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [15 U.S.C. 41 et seq.], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement

by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1954 [26 U.S.C. 501(c)(6)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

* * * *

§ 1292. Area telecasting restriction limitation

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

* * * *

§ 1293. Intercollegiate and interscholastic football contest limitations

The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a day if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

* * * *

§ 1294. Antitrust laws unaffected as regards to other activities of professional sports contests

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

* * * *

§ 1295. "Persons" defined

As used in this chapter, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

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NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission lawfully eliminated rules that severely restricted the distant broadcast signals and syndicated programs that cable television operators could offer their subscribers, in light of overwhelming evidence that those rules were not necessary for their intended purpose and disserved the public interest in program diversity.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-520

NATIONAL FOOTBALL LEAGUE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, ET AL.

No. 81-522

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (81-522 Pet. App. 1c-47c) is reported at 652 F.2d 1140. The decision of the Federal Communications Commission (81-522 Pet. Supp. App.) is reported at 79 F.C.C.2d 652.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1981. The petitions were filed on September 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the Federal Communications Commission's decision to repeal its distant signal and syndicated program exclusivity rules for cable television systems. 47 C.F.R. 76.61, 76.151-76.161; see 81-522 Pet. App. 1b-40b.[1] Cable systems generally are required, upon request, to carry the signals of all broadcast stations in the local television market. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 (1972) (opinion of Brennan, J.). This requirement remains in effect. The now-repealed distant signal rules limited the number of television signals that a cable system could import from an area beyond the local television market. The limit varied directly with the size of the television market served by the cable system and the number of available broadcast signals within the market. As the court of appeals observed, "[b]y limiting the number of distant signals, the FCC sought to lessen potential adverse impact on the audience shares of local stations, a policy which ha[d] the additional effect of lessening the attractiveness of cable to potential subscribers" (81-522 Pet. App. 10c; footnote omitted).

The syndicated program exclusivity rules required cable television systems to delete certain non-network

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[1] Other FCC rules provide for the exclusivity of network programs, which, unlike syndicated programs, generally are shown by all affiliates at the same time. The exclusivity rules for network programs have not been affected by the FCC's decision here. See 81-522 Pet. App. 42c-43c n.4.

programs from the distant television signals that the systems otherwise could have carried. Those rules authorized the holder of the copyright to the particular program or a local broadcast television station that had purchased exclusive exhibition rights to the program to demand that the cable system delete the program from the distant signals it imported and transmitted to its subscribers. See generally 81-522 Pet. App. 9c-11c.[2]

When the distant signal and syndicated program exclusivity rules were adopted in 1972, they were based not on clear evidence but on intuition and political compromise. 81-522 Pet. App. 8c-9c; 81-522 Pet. Supp. App. 666-667 & n.15. The Commission frankly admitted that the "facts underlying its theoretical concerns were not fully understood" (81-522 Pet. Supp. App. 666). The distant signal rules were based on an "intuitive model" which assumed that an unregulated cable industry would experience virtually unlimited growth, drawing a substantial number of viewers from local broadcasters, thereby reducing licensees' advertising revenues and their ability to provide service to the public. *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173-178 (1968).

The syndicated program exclusivity rules arose out of a consensus agreement among major elements of

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[2] A prior version of the distant signal rules was involved in the Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and was discussed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 & n.17, 665-667 (1972) (opinion of Brennan, J.).

the cable television, broadcast television, and television program production industries—negotiated in 1972 by the White House Office of Telecommunications Policy[3]—in an effort to facilitate passage of copyright legislation covering cable television.[4] 81-522 Pet. Supp. App. 746-747. Cable retransmission of both local and distant broadcast signals was not covered by the 1909 Copyright Act and therefore did not subject the cable operator to copyright liability. See *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1960); *Teleprompter Corp.* v. *Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974). Because of the process of political compromise by which the exclusivity rules were adopted, "there was virtually no economic analysis of their functioning either by the Commission or, apparently, by the industry groups involved" (81-522 Pet. Supp. App. 746-747).

The Commission's decision in 1980 to repeal the rules was part of a continuing process of reexamining its regulatory scheme for cable television and eliminating restrictions where it had been shown that such revisions will expand the supply of programs to cable subscribers without creating risks of serious

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[3] Limitations of the type included in the negotiated exclusivity rules were not contained in the cable television distant signal rules the Commission was prepared to adopt in 1971. 81-522 Pet. Supp. App. 746.

[4] See *Geller* v. *FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979), where the court ordered the Commission to reexamine the syndicated program exclusivity rules to determine whether there was any valid reason for retaining them in view of the fact that the copyright legislation justification had "long since evaporated."

harm to "over-the-air" television viewers. 81-522 Pet. Supp. App. 815.[5]

2. The inquiry in this proceeding was instituted in 1976, shortly after the enactment of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. (Supp. III) 101 *et seq.* See *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977). Among other things, that Act adopted a system of compulsory licensing of copyrighted programming to cable television, with cable systems for the first time being subject to partial liability for copyright royalties, fixed by statute, for such programming. See 17 U.S.C. (Supp. III) 111(c) and (d). The Commission's inquiry resulted in two extensive staff reports advocating elimination of the distant signal and syndicated programming exclusivity rules. *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979). Employing theoretical economic studies as well as case studies of the actual operation of cable systems in differing environments—including "grandfathered" cable systems that already were subject to less stringent regulation than that in effect under the 1972 rules (71 F.C.C.2d at 688; 81-522 Pet. App. 26c)—the reports tested the "intuitive" assumptions on which the rules had been based. See 71 F.C.C. 2d at 635-636, 661-713, 967-985. Each of the reports concluded that the impact on broadcasting stations from elimination of the rules would

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[5] See, *e.g.*, *First Report and Order in Docket No. 20561*, 63 F.C.C.2d 956 (1977); *Second Report and Order in Docket No. 20561*, 68 F.C.C.2d 18 (1978) (eliminating restrictions on small cable systems); *Report and Order in Docket No. 20487*, 57 F.C.C.2d 625 (1976) (expanding distant signals that cable systems could carry).

be negligible and that elimination of the rules would afford substantial benefits to cable television viewers in the form of increased viewing options. 71 F.C.C. 2d at 713-715, 985-988.

Based upon the *Reports*, the Commission issued a *Notice of Proposed Rule Making*, 71 F.C.C.2d 1004 (1979), that proposed to delete the distant signal and syndicated program exclusivity rules. After widespread public comment and further administrative study, the Commission issued an exhaustive opinion reaffirming the conclusions of the earlier inquiries that elimination of the rules would provide substantial benefits to cable television viewers without disadvantaging broadcasters or "over-the-air" television viewers. 81-522 Pet. Supp. App. 663-900. "[T]he evidence amassed in this proceeding," the Commission stated, "demonstrates clearly that increased competition from less proximate broadcasters will not affect adversely the performance of local television broadcasters. Additionally, there is no evidence that shows that maintenance of the rules expands the supply of television programming or that elimination of the rules will threaten the continued supply of programming" (81-522 Pet. Supp. App. 814). Moreover, the Commission determined that "[t]he regulations artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many communities" (81-522 Pet. Supp. App. 813). Finding that elimination of the rules therefore would enhance consumer welfare generally without disadvantaging non-cable viewers, the Com-

mission concluded that its "obligation to rescind the rules is clear" (81-522 Pet. Supp. App. 815).

The *Report and Order* also rejected an alternative proposal that would have required cable operators to obtain program-by-program permission ("retransmission consent") from the distant television station before carrying that station's programming.[6] In the Commission's view, this proposal was inconsistent with Congress' decision to grant cable systems a compulsory license to transmit broadcast programs and to provide for the royalty for such transmission to be established by the Copyright Royalty Tribunal, rather than through individual negotiations. 81-522 Pet. Supp. App. 769-813.

3. On petitions for review, the court of appeals upheld the Commission's decision. The court carefully examined the language and the legislative history of the Copyright Act of 1976 and concluded that Congress did not, as petitioners argued, intend to codify the FCC's cable television rules in the 1976 Act or to bar the FCC from rescinding them. 81-522 Pet. App. 18c-22c. Observing that 17 U.S.C. (Supp. III) 801 authorizes the Copyright Royalty Tribunal to readjust the statutory royalty rate paid by cable operators for the transmission of programming subject to compulsory licensing in the event of an administrative alteration of the FCC's rules, the Court found that "[t]he plain import of § 801 is that the FCC, in its development of communications

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[6] This proposal was advanced by the National Telecommunications and Information Administration of the Department of Commerce, but was opposed by the Department of Justice, the Copyright Office, and the Congressional Research Service, which were of the view that the Commission was without authority to adopt the proposal. 81-522 Pet. Supp. App. 782.

policy, may increase the number of distant signals that cable systems can carry and may eliminate the syndicated exclusivity rules, in which event the Tribunal is free to respond with rate increases" (81-522 Pet. App. 21c-22c).

The court of appeals also concluded that the suggested retransmission consent scheme would be "inconsistent with a basic arrangement of the new [copyright] legislation" (81-522 Pet. App. 23c) because cable operators would be forced to negotiate with numerous broadcasters and would not be guaranteed retransmission rights, "a scenario Congress considered unworkable when opting for the compulsory licensing arrangement." Thus, retransmission consents "would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected" (*ibid.*). In addition, the court noted that "[a] rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme * * *, [which] delegate[s] broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so require[s]" (81-522 Pet. App. 23c-24c).

The court found no basis for the argument that the Commission was required to "grandfather" existing program exclusivity contracts. It pointed out that "[t]he property of regulated industries is subject to such limitations as may reasonably be imposed in the public interest" and that "in deciding not to grandfather existing exclusivity rights, the Commission considered evidence indicating that these ex-

clusivity rights were rarely asserted" (81-522 Pet. App. 31c-32c).

In reviewing the Commission's decision in its entirety, the court concluded that it "reflects the 'rational weighing of competing policies' Congress intended to be exercised by the agency and to be sustained by a reviewing court" (81-522 Pet. App. 37c-38c). The court found no reason to "doubt the reasonableness of the FCC's conclusion that programming on free television will not substantially change or diminish after deregulation" (81-522 Pet. App. 34c). It added that "[i]n shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal" (81-522 Pet. App. 36c).[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petitions for a writ of certiorari also present no important, unsettled question of law that warrants this Court's attention. Further review therefore is unnecessary.

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[7] The court of appeals also rejected the argument that insufficient consideration was afforded to the effect of deregulation on sports programming. 81-522 Pet. App. 27c, 32c-33c. It pointed out that "the Commission did respond to the sports leagues' comments in the Report and Order"; that "the leagues did not produce any evidence that the number of sports broadcasts by home clubs has been reduced in the existing areas of high cable penetration, or would be reduced in the future"; that "many variables besides the availability of sports programming on television influence gate attendance"; and that "[i]t was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules." 81-522 Pet. App. 32c-33c.

1. Last Term, this Court once again emphasized the FCC's "broad power to regulate in the public interest" and the "broad discretion" Congress granted the Commission in determining how best to achieve the goal of the Communications Act of 1934 "to secure the maximum benefits of radio to all the people of the United States" (*FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 11, quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943)). The Court also reiterated that deference must be afforded the agency's expert knowledge when it is making predictive judgments about the direction in which the future public interest lies. *Id.* at 11-12; see also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793-795 (1978).

The Commission's decision to repeal the distant signal and syndicated programming exclusivity rules at issue in this case was based on an exhaustive four-year empirical study and legal analysis in which there was widespread participation by the public and by all affected segments of the relevant industries.[8] Indeed, petitioners do not now seriously question the reasonableness of the Commission's judgment that the overall public interest will be better served by repeal of these rules. Rather, their attention is focused more narrowly on the impact of the Commission's actions on the interests of particular constituent elements of the broader public interest—

[8] See *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C. 2d 9 (1977); *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979); *Notice of Proposed Rule Making*, 71 F.C.C.2d 1004 (1979); *Memorandum Opinion and Order*, 79 F.C.C.2d 663 (1980) (81-522 Pet. Supp. App. 663).

copyright holders, local broadcast stations, and sports television.

The argument (81-522 Pet. 21-23) that the Commission ignored its responsibility to assure the best practicable service to all the public (see 47 U.S.C. 151) rests on the mistaken premise that providing maximum protection of local broadcasting stations from competition for their markets and a greater return for copyright holders necessarily provide the only way of fulfilling that responsibility. This premise simply ignores the teaching of this Court's decisions that there are multiple—and often competing—policies that Congress, through the Communications Act, has charged the Commission with implementing. See *FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 13-14; *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 796-797; *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 669 (1972). Here, the Commission engaged in a rational weighing of the effect of repeal of the rules on the statutory policy of ensuring adequate local television service, the goal petitioners stress, against the effect of repeal on the viewers' and public's interest in maximizing diversity of television service (see *FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 10-14), while recognizing that Congress had separately addressed the copyright liability of cable operators in the 1976 revision of the Copyright Act. Its decision was a reasonable administrative response fully supported by a substantial record.

Based on its exhaustive investigation, the Commission found that the impact on local television stations of eliminating the restrictions on distant signals that cable systems may carry would be minimal and would be more than offset by continued revenue growth that will result from increasing population and advertising demand. 81-522 Pet. Supp. App. 742-

746. The Commission also rejected the claim, again advanced by petitioners here (81-522 Pet. 22), that the repeal of the rules providing syndicated exclusivity protection would result in the total withdrawal of syndicated programming from local broadcast exhibition. 81-522 Pet. Supp. App. 757. The Commission pointed out that the actual experience of television stations in "grandfathered" markets showed that those stations continued to purchase—and program suppliers continued to sell—even those syndicated programs that also were imported by cable from distant stations. *Ibid.*

Moreover, the Commission not only found that the local service objectives of the Communications Act would not be jeopardized by removal of these regulations; it also concluded that their retention would actually disserve the statutory objective of program diversity by depriving cable viewers of programming available on distant stations that would be carried by the cable systems but for the FCC's restrictions. 81-522 Pet. Supp. App. 813-815. In this respect, the court of appeals correctly observed that, "[i]n shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television service that should increase program diversity, a valid FCC regulatory goal" (81-522 Pet. App. 36c).

In *United States* v. *Southwestern Cable Co.*, *supra*, this Court noted the Commission's acknowledgement, when it adopted the first distant signal rules, "that it could not predict with certainty the consequences of unregulated CATV," and the Court itself recognized "that these consequences have been variously estimated." 392 U.S. at 176-177. Moreover, as this Court has only recently reiterated, "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if

necessary to serve the public interest more fully" (*FCC* v. *WNCN Listeners Guild*, *supra*, slip op. 21). After a thorough reassessment, the Commission has concluded that "time and changed circumstances reveal that the 'public interest' is not served by application of the Regulations," and it has "act[ed] in accordance with its statutory obligations" in repealing them. *Ibid.*, quoting *National Broadcasting Co.* v. *United States*, *supra*, 319 U.S. at 225. Petitioners have offered no basis for this Court to disagree with that considered judgment.

2. Petitioner NAB nevertheless argues (81-522 Pet. 17-21) that Congress' 1976 revision of the Copyright Act had the effect of withdrawing from the Commission the authority it otherwise had under the Communications Act to repeal the rules. This contention was correctly rejected by the Commission (81-522 Pet. Supp. App. 788-813) and the court of appeals (81-522 Pet. App. 17c-22c). The plain language of the Copyright Act demonstrates that it was not intended to codify the substance of the distant signal and syndicated program exclusivity rules as they existed in 1976. Indeed, Section 801 provides for the adjustment of royalty rates in the event of an *alteration* in either set of rules (17 U.S.C. (Supp. III) 801(b)(2)(B) and (C)), thereby expressly *preserving* the Commission's broad discretion under the Communications Act to change or eliminate the rules as the public interest requires. See *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), slip op. 23-25.

The legislative history of the 1976 Act is consistent with the clear import of its language. Although petitioners accurately observe (81-522 Pet. 18) that the House Report cautioned the Commission not to rely upon the passage of the Act as a *directive* for regulatory reform, the Report also makes

clear that Congress intended to place no limitation on the Commission's authority to modify or eliminate the rules upon a finding that their continued application disserved the public interest (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976)), precisely the finding made by the Commission here. See 81-522 Pet. App. 22c. Foreseeing the possibility that the rules might be altered, the Report expressly states that the purpose of Section 801 was to implement Section 111's scheme for extending the compulsory license established under that Section not only to the carriage of distant signals and programming then permitted, but also to any *additional* signals and programs authorized by subsequent amendment of the Commission's rules. H.R. Rep. No. 94-1476, *supra*, at 176.[9]

3. Although petitioners argue that the 1976 Copyright Act prohibits repeal of the distant signal and

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[9] Petitioners offer anecdotal evidence that three individuals, only one of whom was a legislator, believed that Congress, when it revised the copyright laws in 1976, did not anticipate that the Commission would repeal the distant signal and syndicated programming exclusivity rules. But even if these statements were persuasive indicia of the *expectations* of certain Members of Congress when the copyright law was revised, and that these expectations could be attributed to Congress as a whole, a background of such expectations, without more, would not constitute *legislation* repealing the Commission's conceded and unamended authority under *another* statute—the Communications Act—to rescind the regulations in furtherance of the public interest. See *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("legislative intention, without more, is not legislation"). Moreover, isolated post-enactment views such as these are of limited value under any circumstances and cannot serve as a basis to ignore the plain language of the statute or the legislative intent of Congress expressed before the Act's passage. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

exclusivity rules, they make the inconsistent argument, in support of the proposed retransmission consent requirement, that "the new Copyright Act leaves the FCC free to regulate the circumstances in which cable systems may retransmit distant broadcast signals so long as broadcast stations and their program suppliers are not deprived of the minimal right established by the Copyright Act itself" (81-522 Pet. 12). Both the Commission (81-522 Pet. Supp. App. 791-808) and the court of appeals (81-522 Pet. App. 23c-25c) rejected petitioners' contorted interpretation of the 1976 Copyright Act and correctly held that adoption of a retransmission consent proposal "would be inconsistent with a basic arrangement of the new legislation" (81-522 Pet. App. 23c).

The retransmission consent scheme advanced before the Commission would have forced cable operators to negotiate individually with numerous distant broadcasters in order to be able to retransmit their signals and would have afforded the distant broadcasters the right to deny consent to retransmit their signals or to grant consent with conditions, such as the payment of a fee. See 81-522 Pet. Supp. App. 770, 800-805. Moreover, the broadcaster ordinarily would not be in a position to grant the requisite consent to a cable system without first obtaining the permission of (and paying any additional fee demanded by) the copyright owner whose programs would be retransmitted. Retransmission consent, thus, would function no differently from full copyright liability. But when it enacted the Copyright Revision Act of 1976, Congress "recognize[d] that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system" (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 8

(1976)). It therefore rejected full copyright liability in favor of a system of compulsory licensing, subject to the mandatory payment of a royalty for retransmission of distant signals. Because the retransmission consent proposal is the equivalent of the system of full copyright liability that Congress expressly considered and rejected,[10] approval of such a scheme by the Commission " 'would in effect deprive the [1976 copyright] statute of its efficacy; in other words, render its provisions nugatory' " (*Nader* v. *Allegheny Airlines*, 426 U.S. 290, 298 (1975), quoting *Texas & Pac. Ry.* v. *Albilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)). Faced with such "irreconcilable conflict" (426 U.S. at 299) the Commission correctly rejected the retransmission consent requirement.

The retransmission consent proposal also would have been inconsistent with the legislative establishment in the Copyright Act of both the specific royalty formula and the designation of the appropriate forum—the Copyright Royalty Tribinal—for its readjustment. As the court of appeals pointed out, "it [is] difficult to imagine that Congress intended its formula for royalty fees to be only a minimum subject to FCC alterations, since it delegated broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so required" (81-522 Pet. App. 24c).

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[10] As the Commission explained (81-522 Pet. Supp. App. 798-801), even before 1976, Congress had declined to enact proposals to require consent for retransmission by cable systems. See also *Hearings on H.R. 4347, et al. Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 35-36, 45-46 (1965); H.R. Rep. No. 2237, 89th Cong., 2d Sess. 77-88 (1966); *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 777-785 (1975).

Petitioners' argument (81-522 Pet. 14-16) that 17 U.S.C. (Supp. III) 301, nevertheless permits adoption of the retransmission consent proposal is groundless. Section 301(d) simply provides that "[n]othing in this title annuls or limits any rights or remedies under any other federal statute." The retransmission consent proposal could not reasonably be characterized as a "right" or "remedy" provided by the Communications Act.[11] Moreover, this Court has, in any event, held that where there is a clear and irreconcilable conflict between two statutes, a general savings clause will not prevent the courts from giving full effect to the later-enacted law. See *Nader* v. *Allegheny Airlines, supra*, 426 U.S. at 299; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co., supra*, 204 U.S. at 446. The Commission correctly concluded that "the savings clause in Section 301(d) * * * does not eliminate the fundamental irreconcilability between the Copyright Revision and a Commission-imposed retransmission consent requirement" (81-522 Pet. Supp. App. 811).[12]

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[11] Indeed, the Commission concluded (81-522 Pet. Supp. App. 792-797) that, even aside from limitations imposed by the 1976 Copyright Act, it did not have authority under the Communications Act to impose a retransmission consent requirement, in view of the absence of evidence showing that this was necessary to protect local broadcast stations. The court of appeals did not reach this issue. 81-522 Pet. App. 44c n.11.

[12] Aside from the substantial legal difficulties with the retransmission consent proposal, the Commission also noted the evidence in the record that a period of experimentation with retransmission consent in 1968 had failed, that the Copyright Office had cited the "unanimous opinion of cable, broadcast and program production interests in 1971 that retransmission consent would not work," and that the expert view of the Copyright Office was that it would result in "massive retransmission denials rather than consents." 81-522 Pet. Supp. App. 786.

4. Petitioners further contend (81-522 Pet. 23-24) that the court of appeals erred in affirming the FCC's refusal to grandfather existing syndicated program exclusivity contracts when it eliminated the exclusivity rules. See 81-522 Pet. App. 31c-32c; 81-522 Pet. Supp. App. 767-768. However, the court of appeals did no more than rely on the well-established principles, accepted in this Court's holding in *United States* v. *Midwest Video Corp.*, *supra*, that " '[t]he property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest . . . new rules may abolish or modify pre-existing interests' " (406 U.S. at 674 n.31 (opinion of Brennan, J.), *quoting General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 863-864 (5th Cir. 1971)). Petitioners argue that "[t]his Court and others have repeatedly held that administrative agencies may and should take existing equities into account in modifying their rules" (81-522 Pet. 23). But the Commission *did* take existing equities into account here; it simply concluded that the record did not establish a need for a grandfather provision to protect the public interest or even to prevent injury to the private parties to such contracts. See 81-522 Pet. Supp. App. 767-768 & n.275. The reasonableness of the Commission's decision is further highlighted by the fact that the broadcast industry was placed on notice in 1976 that the rules might be eliminated. See *Notice of Inquiry*, *supra*, 61 F.C.C.2d at 751. And, although as petitioners point out (81-522 Pet. 23 n.22), a limited grandfather period of up to three years was suggested in the 1979 *Notice of Proposed Rule Making*, *supra*, 71 F.C.C.2d at 1027, that period is more than two-thirds completed already.

5. *a.* Finally, petitioner National Football League (NFL) argues (81-520 Pet. 8-11) that the Commission should have provided in its rules for the NFL to assume complete control over the telecast of the league's games in local markets, and thereby limit the number of NFL games that could be transmitted into a local market, notwithstanding the Commission's elimination of distant signal limitations for other types of programming.[13]

At the present time, NFL games are broadcast over two networks on Sunday.[14] Under the league's current contract with the networks, each game is televised back to the home territory of the visiting team, and two additional league games usually are telecast in that territory as well. In the territory of the home team, the local game is blacked out unless it is sold out 72 hours before kickoff, in order to protect the live gate, but two other games usually are telecast.

The NFL argues that the repeal of limitations on the number of distant signals that may be transmitted into a local market will result in an increase in the number of NFL games shown in that market beyond the two or three currently allowed. This potential increase, it is argued, will adversely affect live attendance at the home team's game. The NFL also argues that the potential increase in the number of televised games might have an adverse impact upon the league's goal of ensuring equal television

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[13] The NFL states (81-520 Pet. 11) that its games are carried almost exclusively over one of the three commercial television networks. The Commission's elimination of the *syndicated* programming exclusivity rules therefore presumably will have no impact on the NFL.

[14] The third network carries games on Monday nights and at other special times.

revenue and roughly equal exposure for member clubs. Accordingly, the NFL argues that the Commission was required to provide the NFL with some means by which it could limit the number of games telecast in any one market to two or three (or more, presumably, if the league so elected). The court of appeals properly rejected this contention, concluding that "[i]t was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules" (81-522 Pet. App. 33c).

With respect to the protection of the live gate, the most important protection for this source of revenue insofar as cable television is concerned—the black out rule (47 C.F.R. 76.67)—remains in force and is not affected by the Commission's action under review here. Moreover, as the FCC and court of appeals both observed (81-522 Pet. App. 33c; 81-522 Pet. Supp. App. 810), other factors, such as the weather and the caliber of the home and visiting teams, appear to have a greater impact on home attendance than does the availability of sports programming on television. The Commission found, for example, that the television audience prefers to watch the home team's games rather than those of other teams by a 5 to 1 margin. 81-522 Pet. Supp. App. 810. Thus, there is no reason to believe that an increase in the number of out-of-town games televised in the local market will significantly affect live attendance.[15] This conclusion is consistent with the Commission's view in 1975 when it adopted the black-out rule in

[15] Does common sense suggest, for example, that New Yorkers will not go to the Meadowlands to see their Giants play the Washington Redskins simply because there is a New Orleans Saints-Tampa Bay Buccaneers game on cable television at the same time?

47 C.F.R. 76.67. Then, as now, the Commission found no "public interest rationale" for any additional protection for sports programming, because no evidence of harm from distant signal importation of sports programming had been presented. *Report and Order in Docket No. 19417*, 54 F.C.C. 2d 265, 277-283, reconsideration denied, 56 F.C.C.2d 561 (1975).

Nor does the repeal of the distant signal rules affect the NFL's policy of providing for all member teams to share equally in the league's television revenues. The league may continue to divide up television revenues equally, irrespective of whatever pattern of retransmission of broadcast games may develop. The degree to which repeal of the rules will undercut the NFL's policy of "roughly equal exposure" for all member teams is speculative at this time. It seems likely that even before the distant rules were repealed, more viewers actually *watched* games involving the better teams in the league, even if all games were made *available* to viewers on a "roughly equal" basis, as the NFL suggests. But, in any event, the interest of the league members in gaining "roughly equal exposure" for themselves must be balanced against the public's interest in diversity of programming generally.

b. Perhaps recognizing that the implementation of the public interest standard under the Communications Act did not, on the record in this case, require the Commission to develop special cable rules (beyond the black-out rule) for sports programming, the NFL now expressly disavows reliance on the Communications Act. See 81-520 Pet. 8-9. Instead, it argues that another Act, Pub. L. No. 87-331, 75 Stat. 732 (15 U.S.C. 1291-1295), reflects a national policy of permitting professional sports leagues to control telecasting of their games and that the Commission was required to implement that policy.

The NFL's argument based on Pub. L. No. 87-331 is in error for several reasons. First, it rests on a manifestly overbroad reading of Pub. L. No. 87-331. Although 15 U.S.C. 1291 creates an antitrust exemption for the league's pooling arrangements for the sale of broadcasting rights, 15 U.S.C. 1292 provides that the exemption shall not apply to agreements that restrict the "televising of any games within any areas, except within the home territory of a member club of the league on a day when such club is playing at home." Thus, there is no basis whatever in the statute for the NFL's argument that the FCC's repeal of the distant signal rules cannot be applied to cable transmission of NFL games in areas *outside* of the home team's territory, as the NFL urges.

That Congress intended to afford the leagues only a limited immunity for agreements restricting telecasts of sports events is evident from the legislative history as well. The purpose of Pub. L. No. 87-331 was to overrule a 1961 court decision holding that a National Football League pooling arrangement with the CBS television network violated a previous antitrust judgment. H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. 1 (1961). That earlier judgment not only had prevented the clubs from ceding the power to determine which games should be telecast and when, but also limited the scope of permissible restrictions on the telecasting of games to those necessary to protect local gate receipts.[16] Pub. L. No. 87-331 was intended

[16] *United States* v. *National Football League*, 116 F. Supp. 319, 322-26 (E.D. Pa. 1953). Specifically, this decision found to be reasonable a restriction that would protect gate receipts by precluding teams from broadcasting their games into the home territories of other teams on days when the other teams

to overrule these earlier cases to the extent that they prohibited clubs from pooling their rights for sale to a network. The statute was not intended, however, to broaden the scope of restrictions that lawfully could be imposed. See H.R. Rep. No. 1178, *supra*, at 1-5; see also 107 Cong. Rec. 20060 (1961) (remarks of Rep. Celler).[17]

But even when Pub. L. No. 87-331 is properly read as limited to agreements that restrict telecasts in the territory of a team that is playing at home, nothing in the law suggests that the FCC is required to embody the provisions of such an agreement in its own regulations, irrespective of the public interest balance that otherwise might be struck under the Communications Act itself. Pub. L. No. 87-331 merely furnishes an exemption from antitrust liability for *private conduct* that had been held to constitute an unreasonable restraint of trade under the antitrust laws. Professional sports leagues did not thereby also acquire, *sub silentio*, an exemption from regulation by the governmental body charged with determining

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were playing at home. In contrast, it found to be unreasonable a restriction that precluded teams from telecasting their games into territories of other teams on days when the other teams were playing away from home and permitting the telecast of their games into the home territory. *Id.* at 326-327.

[17] The legislative history of Pub. L. No. 87-331 does reflect congressional concern for assuring that away-from-home games would continue to be broadcast back to the teams' home territories and for protecting the television revenues of the weaker clubs in the league. See 81-520 Pet. 4. However, Congress believed that those concerns would be met by permitting the leagues to act in concert in negotiating with the networks. H.R. Rep. No. 1178, *supra*, at 2-3; S. Rep. No. 1087, *supra*, at 2-3. There is no evidence that Congress believed that it was necessary to enlarge the scope of permissible restrictions that professional teams could employ.

and furthering the *public interest* with respect to television generally.

As times have changed, the NFL itself has determined that protection of the live gate does not require an *absolute* prohibition against telecasts in the territory of a member club playing at home, such as that contained in its contract with CBS in 1961, when Pub. L. No. 87-331 was enacted. The league now permits at least two such telecasts, as well as the home game itself if it is sold out at least 72 hours prior to kickoff. And yet the NFL argues that the FCC—the expert agency charged by Congress with making predictive judgments about the effect of telecasts—cannot similarly relax its own regulations, as they affect sports broadcasting, when the public interest warrants. The NFL has cited neither legal support nor factual justification for such a result.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC.

STATEMENT OF THE CASE

The National Cable Television Association, Inc. ("NCTA") represents the interests of more than 1,700 cable television systems, serving approximately 65 percent of cable television subscribers nationwide. NCTA participated in the proceedings below before both the Federal Communications Commission and the Court of Appeals. Before the court, NCTA intervened on the side of the respondent FCC.

The Petitioners urge this Court to require that the FCC retain certain restrictions on the carriage of television signals by cable television systems. The FCC has found the restrictions no longer justified, and the United States Court of Appeals for the Second Circuit has affirmed. In an effort to create an issue of interest to this Court, the Petitioners strain to show some inconsistency between the FCC's action and congressional policy behind the Copyright Act of 1976[1] and the limited antitrust exemption granted to professional sports teams by Pub. L. No. 87-331.[2] In fact, however, there is no such inconsistency.

The Petitioners seek to preserve distant signal and syndicated exclusivity restrictions first imposed on cable television systems by the Commission in 1972.[3] When the Commission adopted these rules, it considered them interim measures. They were designed for two purposes: to protect the status quo for television broadcast stations until the actual effect of cable television on their operations could be calculated, and to facilitate the passage of

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[1] Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §101 *et seq.* (1976 & Supp. III 1979)).

[2] Pub. L. No. 87-331, 75 Stat. 732 (codified at 15 U.S.C. §§1291-95 (1976)).

[3] 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), 76.63, 76.151-76.161 (1979). The distant signal rules limited the number of signals from distant television markets that a cable system may transmit to its subscribers. The syndicated exclusivity rules permitted local television stations with exclusive program exhibition rights to demand that a cable system delete those programs from distant signals. See the decision below, Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *reprinted in* National Association of Broadcasters' ("NAB") Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, App. C (September 14, 1981) [hereinafter cited as the "NAB Pet."]; *see also* Report & Order in Dockets 20988 and 21284, 79 F.C.C.2d 663, 668-69 (1980) [hereinafter cited as the *1980 Report & Order*].

copyright legislation to define the respective rights of program producers, television stations, and cable television systems.[4] The Commission noted, both at that time and later, its desire to "maintain the necessary flexibility to adjust the rules as developments warranted and experience dictated."[5]

By 1980 events had washed away both of the original underpinnings of the rules. First, in 1976 Congress had adopted copyright legislation defining the rights of program producers and television stations in programs carried on cable systems in distant markets. Recognizing the difficulty of private "market-place" bargaining among these interests, Congress had established a "compulsory license." Cable systems automatically were awarded a compulsory license for the carriage of distant signals permitted under FCC regulations, and a system of royalty payments to program producers had been established. Second, with the encouragement of the Court of Appeals for the District of Columbia Circuit,[6] the Commission had compiled extensive data showing that neither the

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[4] In 1968 this Court held that cable retransmission of broadcast signals was not a "performance" under the Copyright Act of 1909. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400-401 (1968). In 1976 this Court confirmed that the *Fortnightly* holding applied to the importation of distant signals. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 409 (1974).

[5] Report in Docket No. 21284, 71 F.C.C.2d 632, 654 (1979) [hereinafter cited as the *Economic Inquiry Report*]; *see also* Cable Television Report and Order, 36 F.C.C.2d 143, 210, *recon.*, 36 F.C.C.2d 326 (1972).

[6] In Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979), the District of Columbia Circuit had ordered the FCC to consider whether its restrictions on cable television signal carriage were still warranted following the passage of the Copyright Act of 1976.

distant signal restrictions nor the syndicated exclusivity rules were justified.[7]

SUMMARY OF ARGUMENT

In their effort to argue that the Commission's relaxation of cable television signal restrictions conflicts with congressional policies, the Petitioners have stretched those policies beyond recognition.

- The Commission's interpretation of the Copyright Act of 1976 did not repeal by implication its jurisdiction under the Communications Act, as argued by the NAB. The jurisdiction that the NAB argues has been repealed improperly by implication was itself only implied under the Communications Act. The Copyright Act has given the Commission clear congressional guidance in the area for the first time.

- The Copyright Act did not freeze the FCC's cable rules, again as argued by the NAB. The wording of the Act itself, as well as the legislative history, shows a plain congressional intention to leave to the FCC the basic decision of what restrictions, if any, should be retained on cable television signal carriage. On the other hand, the express purpose of the Act does not permit the FCC to adopt a system of requiring cable systems to obtain consent from program producers. The concept of "program transmission consent" is directly in conflict with the compulsory license scheme of the Copyright Act.

- The antitrust exemption granted to professional sports teams by Congress does not reflect any congressional judgment about the cable television carriage of games played in distant markets. And even if a congressional policy to protect local games could

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[7] *See generally 1980 Report & Order, supra* note 3; *Economic Inquiry Report, supra* note 5; Report in Docket No. 20988, 71 F.C.C.2d 951 (1979) [hereinafter cited as the *Syndicated Exclusivity Report*].

be discerned, the Commission looked for and found no evidence that importation of distant games by cable systems would injure the professional sports interests.

ARGUMENT

I. There Is No Issue in This Case Concerning Any Repeal by Implication of Statutory Jurisdiction of the Federal Communications Commission.

The NAB crafts an argument without foundation. According to the NAB, the Commission and the court below have interpreted the Copyright Act of 1976 to repeal by implication jurisdiction provided in the Communications Act. The NAB argues that that jurisdiction permits the Commission to require cable television systems to obtain "retransmission consent" before carrying distant television signals. The Commission's and the court's determination that a retransmission consent requirement would be antithetical to the Copyright Act, the NAB argues, amounts to a repeal by implication and must be reflected in a "clearly expressed congressional intention."[8] Yet the NAB's argument is missing crucial linkage: the Commission's jurisdiction over cable television is itself only implied in the Communications Act.

As this Court has emphasized, the Commission's authority over cable television under the Communications Act is "restricted to that reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."[9] The Communications Act does not address the appropriate regula-

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[8] NAB Pet., *supra* note 3, at 12, *quoting* FAA v. Robertson, 422 U.S. 255, 266 (1975).

[9] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); *see also* FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

tory framework for cable television. Thus, the Copyright Act, as interpreted by the Commission, does not override any statutory jurisdiction. The Act fills a statutory void, where previously congressional policy could be discerned only by extension. The cases cited by the NAB setting forth the standards for implied repeals are wholly inapposite.[10]

II. The Court Correctly Held That the Copyright Act Did Not Freeze the Distant Signal and Syndicated Exclusivity Rules.

When Congress passed the Copyright Act of 1976, it was aware of the Commission's distant signal and syndicated exclusivity restrictions on cable systems. Congress anticipated that the Commission might at some future time determine, in the exercise of its implied powers, that the rules should be changed or eliminated. Were the Commission to make such future revisions in its rules, Congress explicitly gave the Copyright Royalty Tribunal authority to adjust the royalty payments made by cable systems to reflect those changes: "In the event that the rules and regulations of the [FCC] are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals," the Act provides, "the royalty rates established by section 111(d)(2)(B) may be adjusted * * *."[11] This is hardly language reflecting an intention to prevent the Commission from changing its signal carriage restrictions.

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[10] We know of no case holding that the strict rule of statutory construction against implied repeals of express statutory provisions applies where there is no express provision to be "repealed."

[11] 17 U.S.C. § 801(b)(2)(B) (1976 & Supp. III 1979).

Although Congress cautioned the Commission not to rely on the passage of the copyright legislation as a mandate for regulatory reform of the cable television rules,[12] it made clear that the FCC was not prohibited from altering its rules. The House Report noted that the Act would extend the compulsory license to the carriage of programming later authorized by an amendment to the FCC's rules: "If these rules are change[d] in the future to allow additional cable carriage of television programs it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes."[13]

The Commission's conclusion that its cable television rules should be revised, moreover, was not based entirely on the passage of the Copyright Act. The decision was reached only after extensive, careful study and the benefit of advice reflecting a broad range of interests. The Commission's investigation into whether the rules should be eliminated lasted for four years. With Appendices, the *Economic Inquiry Report* stretched to 318 pages in the Federal Communications Reports. Thirty-one sets of comments were submitted to the Commission by interested parties. These studies and comments contributed to the Commission's increased understanding of cable television and its effect on broadcast television. For example, the Commission was able to draw on five econometric studies prepared by independent authorities on the present and future demand for cable television.[14] And the actual impact of cable television on local station audiences was reflected in studies of six "grandfathered"

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[12] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1975).

[13] *Id.* at 176.

[14] *Economic Inquiry Report, supra* note 5, 71 F.C.C.2d at 668 n.82.

markets, where cable had been allowed to develop unimpeded by the 1972 rules.[15] The Commission justifiably claimed that new insights now enabled it to proceed with an absence of doubt "uncommon in matters of public policy."[16]

Nor was the Commission required to adopt retransmission consent in place of the discarded rules. The NAB complains of an inability to obtain the benefit of bargained-for exclusivity.[17] Yet the Copyright Act is itself based on Congress' recognition that bargaining by cable television systems in this arena is impractical. Such "item by item negotiating between users and owners of copyright prior to each performance would be so burdensome as to destroy this valuable means of communication and would also effectively deny a valuable market to copyright owners."[18]

Congress intended the compulsory license created by the Copyright Act to be a surrogate for actual bargaining. In contrast, retransmission consent would require cable systems to enter into the very negotiations that the Copyright Act was enacted to avoid. The court below was certainly correct when it explained in detail that retransmission consent is antithetical to the statutory license of the Copyright Act.[19]

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[15] *Id.* at 688-711.

[16] *Id.* at 715.

[17] *See, e.g.*, NAB Pet., *supra* note 3, at 4-5.

[18] H.R. Rep. No. 1476, *supra* note 12, at 362 (additional concurring views of Rep. Danielson). *See also* Ross & Chazen, Federal Regulation of Cable Television: The Visible Hand, 83 Harv. L. Rev. 1820, 1826 (1970).

[19] Malrite T.V. of New York v. FCC, *supra* note 3, 652 F.2d at 1148, NAB Pet., *supra* note 3, at 23c-25c. Retransmission consent is

III. The Limited Antitrust Exemption Granted to Professional Sports Teams Does Not Require the FCC to Regulate Cable Television Carriage of Sports Programming.

The National Football League ("NFL") advances the novel theory that the FCC is obliged to translate the limited antitrust immunity conferred by Pub. L. No. 87-331, *supra* note 2, into a mandate for limitations on the importation of distant television signals by cable systems. The NFL complains about the ability of cable systems, in the absence of the distant signal restrictions, to carry more than a limited number of games. Significantly, however, this case in no way involves importation of a distant station's broadcast of a home game back to the home team's city in violation of "black-out" provisions. The Commission's rules continue to prohibit carriage of a blacked-out game within a 35 mile radius of the city where the game is played.[20]

Pub. L. No. 87-331 exempts from the antitrust laws agreements among sports teams to sell rights to the telecasting of games. The NFL does not contend that the antitrust exemption addresses the issue of cable televi-

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also inconsistent with the Communications Act. In 1976, the same year it enacted the Copyright Act, Congress rejected proposals to amend Section 325 of the Act, 47 U.S.C. § 325 (1976), to impose a retransmission consent requirement applicable to cable systems' retransmission of broadcast signals. Section 325 prohibits broadcast stations from rebroadcasting the signal of another station without its consent. Efforts to extend its reach to cable systems were rejected insofar as the proposal raised issues which Congress deemed would "more appropriately be determined within the framework of copyright legislation rather than within the framework of communications legislation." H.R. Rep. No. 1635, 89th Cong., 2d Sess. 11 (1965).

[20] 47 C.F.R. § 76.67 (1980).

sion carriage of sports programming. Yet the NFL suggests that the Commission was somehow remiss in failing to perceive some congressional policy behind the antitrust exemption in favor of prohibiting excessive importation of competing games into a television market. Neither the Commission nor the Court of Appeals was able to discern any such policy behind Pub. L. No. 87-331, and no such policy is readily apparent. In the absence of such a policy, of course, the NFL's argument loses its essential premise.

Even if the antitrust exemption of Pub. L. No. 87-331 did reflect such a policy, it would demand only that the Commission consider the impact of its rule revisions on that policy. The Commission did so and found "no credible showing" that the general amount of television sports programming would be diminished as a result of the elimination of the distant signal and syndicated exclusivity restraints.[21] The Commission found that television audiences prefer to watch home games over other teams' games by a five-to-one margin and that there is no direct evidence that cable carriage of competing games adversely affects home attendance.[22] These findings are amply supported in the record.[23]

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[21] *1980 Report & Order, supra* note 3, 79 F.C.C.2d at 809-810.

[22] The Commission found that gate attendance is influenced less by the televising of competing games than by external factors such as the weather and the caliber of the home and competing teams. *1980 Report & Order, supra* note 3, 79 F.C.C.2d at 810. The Commission also took note of data showing substantial increases in attendance at professional baseball games, and revenues from television contracts, notwithstanding the emergence of various increased sports offerings on cable systems. *Id.*

[23] Malrite T.V. of New York v. FCC, *supra* note 3, 652 F.2d at 1150, NAB Pet., *supra* note 3, at 32c-33c; *1980 Report & Order, supra* note 3, 79 F.C.C.2d at 809-10.

IV. Conclusion

This case does not warrant the Court's consideration. The Petitioners couch their arguments in terms of alleged conflict between the FCC's relaxation of cable television restrictions and statutory law. In fact, however, there is no predicate for the Petitioners' arguments, because there are no such conflicts. The elimination of distant signal and syndicated exclusivity restraints is entirely consistent with the Copyright Act and the limited antitrust exemption contained in Public Law No. 87-311. The Petitioners' real complaints lie with policy determinations regarding the commercial relationship among program producers, television stations, and cable television systems. These policy determinations are properly made by Congress and the FCC and present no issues for the Court's consideration.

The National Cable Television Association respectfully requests that the Petitions for Certiorari of the National Association of Broadcasters and the National Football League be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

RELEVANT STATUTES

EXCERPTS FROM THE COPYRIGHT ACT OF 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §101 *et seq.* (1976 & Supp. III 1979))

[17 U.S.C. §111(c)(1976 & Supp. III 1979)]

§111(c) Secondary transmissions by cable systems

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

[17 U.S.C. § 301 (1976 & Supp. III 1979)]

§ 301. Preemption with respect to other laws.

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

* * *

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

[17 U.S.C. § 801(b)(2)(B)(1976 & Supp. III 1979)]

§ 801(b) Subject to the provisions of this chapter, the purposes of the [Copyright Royalty] Tribunal shall be —

* * *

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

* * *

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided,* That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment.

* * *

EXCERPTS FROM THE COMMUNICATIONS ACT OF 1934, AS AMENDED (codified at 47 U.S.C. §151 et seq. (1976))

[47 U.S.C. §151 (1976)]

§151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several

agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

[47 U.S.C. §152(a)(1976]

§152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

[47 U.S.C. § 325(a)(1976)]

§ 325.(a) False distress signals; rebroadcasting programs

No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

PUBLIC LAW NO. 87-331, 75 Stat. 732 (codified at 15 U.S.C. §§1291-95 (1976))

[15 U.S.C. §1291(1976)]

§1291. Exemption from antitrust laws of agreements covering telecasting of sports contests and combining of professional football leagues

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 U.S.C. 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [15 U.S.C. 41 et seq.], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1954 [26 U.S.C. 501(c)(6)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

* * *

[15 U.S.C. §1292 (1976)]

§1292. Area telecasting restriction limitation

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

* * *

[15 U.S.C. §1293 (1976)]

§1293. Intercollegiate and interscholastic football contest limitations

The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a date if —

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

* * *

[15 U.S.C. §1294 (1976)]

§1294. Antitrust laws unaffected as regards to other activities of professional sports contests

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, be-

tween, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

* * *

[15 U.S.C. §1295 (1976)]

§1295. "Persons" defined

As used in this chapter, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

APPENDIX B

RELEVANT REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

[47 C.F.R. § 76.67 (1980)]

§ 76.67 Sports broadcasts.

(a) No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place, shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the community unit pursuant to the mandatory signal carriage rules of this part. For the purposes of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or local team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed.

(b) Notification of the programming to be deleted pursuant to this section shall include the following information:

(1) As to programming to be deleted from television broadcast signals regularly carried by the community unit:

(i) The name and address of the party requesting the program deletion;

(ii) The date, time and expected duration of the sports event the television broadcast of which is to be deleted;

(iii) The call letters of the television broadcast station(s) from which the deletion is to be made.

(2) As to programming to be deleted from television broadcast signals not regularly carried by the community unit:

(i) The name and address of the party requesting the program deletion;

(ii) The date, time and expected duration of the sports event the television broadcast of which is to be deleted.

(c) Notifications given pursuant to this section must be received, as to regularly scheduled events, no later than the Monday preceding the calendar week (Sunday-Saturday) during which the program deletion is to be made. Notifications as to events not regularly scheduled and revisions of notices previously submitted, must be received within twenty-four (24) hours after the time of the telecast to be deleted is known, but in any event no later than twenty-four (24) hours from the time the subject telecast is to take place.

(d) Whenever, pursuant to this section, a community unit is required to delete a television program on a signal regularly carried by the community unit, such community unit may, consistent with the rules contained in Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(e) The provisions of this section shall not be deemed to require the deletion of any portion of a television signal which a community unit was lawfully carrying prior to March 31, 1972.

(f) The provisions of this section shall not apply to any community unit having fewer than 1,000 subscribers.